SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73 561

LAWRENCE HARVEY DIAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on August 28, 1973.

OPINIONS BELOW

There is no opinion from the District Court below. The opinion of the Court of Appeals is printed in Appendix A herein. It is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1973. An order denying rehearing was entered on August 28, 1973. An order granting a stay of issuance of mandate was entered on September 4, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether an order of the District Court denying a criminal defendant's motion to dismiss an indictment on the ground of double jeopardy, is an appealable order, where defendant's first trial aborted after the trial judge's confusion of the jury compelled defendant's counsel to mouthe a motion for mistrial.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is Amend. V., U. S. Const., set forth herein in Appendix B herein.

STATEMENT OF CASE

Petitioner was charged with having stolen and carried away twelve ladies' coats in violation of 18 U.S.C. § 659. A jury trial began March 26, 1973, and it aborted on March 26, 1973 when the trial judge discharged the jury before a verdict could be returned. Petitioner's subsequent motion to dismiss the

indictment against him was denied without opinion. Petitioner filed an appeal from such denial to the Court of Appeals. Upon motion of respondent, the appeal was dismissed for lack of finality. A rehearing in the Court of Appeals was denied, and a stay of mandate issued.

The proceedings in the district court upon which double jeopardy is asserted is as follows:

On November 6, 1972 petitioner was employed by Consolidated Freightways as a truck driver. He was not a regular driver for Consolidated, and he had not driven for Consolidated, if at all, in several years. His employment on November 6 was considered to be as a "casual" driver, not as a regular employee.

Petitioner reported for work at around 8:00 a.m., when he was assigned a route by the company dispatcher, which included a delivery to Mervyn's Department Store warehouse in San Leandro, California. The route assigned to petitioner included several stops which he was free to make in any order he chose, so long as he completed it during the course of the 8-hour day.

Because equipment was not available when petitioner reported for work, he was instructed to go with the Company Safety Supervisor, Howard (Buck) Clark, to obtain leased equipment. Clark and petitioner spent about 15 minutes together, but Clark did not introduce himself to petitioner, nor did he tell petitioner who he was or what his role was in the company. Clark testified that he "knew" petitioner

because he had seen him at company meetings three years earlier, but he was not introduced to petitioner then, and he had not seen him during the three-year interval. One of the other "casuals" who was present when Clark and petitioner were going to obtain equipment, testified that Clark asked, when petitioner left the car, "Who is that guy?" Clark's question was prompted by a heated exchange between him and petitioner about the use of a seat belt in the car. Clark denied asking the identity of petitioner or having heated words in the car with him.

The thrust of the case against petitioner was testified to by Clark. He testified that, after he made arrangements for equipment to be used by petitioner, he left him at the equipment company. Clark then returned to the Consolidated Terminal, which he left at 11:40 a.m. to make a stop at the post office, and then to go home for lunch. While he was in his house, he saw a company truck go by at 12:10 p.m. He wondered what it was doing in his neighborhood so he left his house and observed the truck parked about two blocks from his house. He called the company dispatcher to find out who had the truck. He was told that petitioner had it, and that it was properly in the neighborhood. Clark returned home, had lunch, and when he left, he still saw the equipment parked two blocks away. Clark called the dispatcher again, to inquire how long petitioner had for lunch. Although the company contract authorized a one-hour lunch period, Clark was told that petitioner had a one-half hour lunch period.

According to Clark, he then went to a point about 9 houses from where the truck was parked, a distance of about 1,125 feet. He claimed that from that point he observed petitioner come out of petitioner's house, go to the back of the trailer, push up the back door, and remove and go toward the house with something. He described the "something" as a bundle of clothing, but he admitted he could not see what petitioner was carrying.

After making these observations, Clark said that he drove to within 100 feet of petitioner's home, and then to within six feet of the trailer. He testified that he saw petitioner remove 12-15 coats from the trailer and carry them toward the house. As petitioner reached the porch of the house, he looked toward Clark, and then returned to the trailer, throwing the clothing inside. Clark called to petitioner, but he did not respond. Instead, petitioner went on his porch and carried back some plastic bags which he placed in the trailer.

Clark sealed the trailer door, took some photographs of petitioner in the trailer, and ordered petitioner to return to the company terminal. Petitioner ignored the order and proceeded to make delivery of the goods to Mervyn's Department Store. At Mervyn's, Clark stopped the delivery, after a brief disputed physical encounter with petitioner.

The only photograph taken by Clark which shows petitioner only reveals him standing in the trailer by some cartons. The coats introduced in evidence were

removed from cartons in the truck by an agent of the F.B.I., who did not arrange for fingerprint evidence or take photographs of the inside of the trailer. No search warrant was sought for petitioner's home. The coats which were removed by the F.B.I. and which were introduced at trial could have been improperly repacked.

There were no coats missing from the load entrusted to petitioner, although a later inventory revealed that there were goods missing from the shipment due to Mervyn's, which apparently was reported before any cartons were given to petitioner for delivery.

Because of the trial judge's ruling that petitioner's earlier conviction for crime would not be excluded, he did not testify at the trial. There was testimony: that the goods with which petitioner was charged with taking were originally packed in Korea; when they arrived in the United States they were repacked; the cartons were loaded onto the trailer driven by petitioner by a loader who is unknown to the Company; when petitioner began work, he was not given any instructions about reporting broken cartons; it is not unusual for cartons to be broken while in transit to deliveries; petitioner did not know the identity of Clark.

The testimonial record was concluded on the afternoon of Wednesday, March 28, 1973. The trial judge delivered extensive jury instructions that afternoon. These instructions included those dealing with specific intent to convert goods to petitioner's own use. After

delivering those instructions, a conference in chambers was held, after which further instructions were given, touching upon specific intent.

Closing arguments were commenced the next day, March 29, 1973, after which the trial judge briefly instructed on the elements of the offense and evidence, circumstantial evidence, and juror's duty. The jury retired to deliberate at 11:50 a.m. At 4:20 p.m.[1] court convened, and the judge announced that the jury wanted "a re-reading of the Judge's instructions pertaining to whether the removal of the goods from the truck constitutes intent regardless of the defendant's state of mind."

Instead of re-reading the instructions as previously given, the trial judge proceeded to answer the jurors' question by rephrasing and paraphrasing the instruction on specific intent. The jury then retired to continue deliberations.

At 5:30 p.m. the trial judge *sua sponte* called the jurors into court and inquired about the jurors' plans with respect to further deliberations. The jury reported it was having difficulty with the element of specific intent, and it requested the judge to redeliver the instruction as he had first given it. He proceeded *sua sponte* to rephrase and paraphrase an instruction on specific intent.

The jury indicated it might be able to reach a verdict if the cause could be recessed until the next

[1]There is nothing in the record to reflect the fact the jury was at lunch between noon and 1:30 p.m.

morning. But, the trial judge called counsel into chambers when petitioner's counsel urged that instructions be re-read precisely as originally delivered. When this motion was denied, petitioner's counsel moved to discharge the jury as being deadlocked because the judge confused the jurors by failing to repeat the instructions as earlier given. The trial judge made no ruling at the time.

When court reconvened after the chambers discussion in the presence of the jury, the trial judge abruptly discharged the jury and declared a mistrial.

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit Court of Appeals is in conflict with the decision of *United States v. Landsdown,* 460 F.2d 164 (4th Cir., 1972). That case held that an order denying a motion to dismiss an indictment based upon grounds of double jeopardy, is a final and appealable order. Note 8 of *Landsdown* relied upon by the Ninth Circuit is not applicable because the motion for mistrial was forced upon petitioner's counsel. *United States v. Walden,* 448 F.2d 925 (4th Cir., 1971). Thus, the mere ceremonial making of a mistrial motion does not bar an appeal.

2. The Fifth Amendment's double jeopardy provision would have little meaning if petitioner is unable to test its applicability before being subjected to a second trial. *United States v. Jorn,* 400 U.S. 470 (1970). The decision by the Ninth Circuit begs the

question because it is only by a full deliberative appeal that the issue of counsel's making a mistrial motion, can be weighed against the conduct of the district court in confusing the jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California, this 25th day of September, 1973.

Respectfully submitted,

VICTOR J. VAN BOURG,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

No. 73-1929

United States of America,
Plaintiff-Appellee,
vs.
Lawrence Harvey Dias,
Defendant-Appellant.

[Filed August 15, 1973]

Before: BROWNING and WRIGHT, Circuit Judges

ORDER

On motion of appellee, the appeal herein is dismissed because not taken from a final order of the district court, in accordance with 28 U.S.C. § 1291.

Appellant urges us to adopt the rule of *United States* v. *Landsdown*, 460 F. 2d 164 (4th Cir., 1972). We need not reach that issue. It appears that the jury in appellant's first trial was dismissed after appellant made a motion for mistrial. On these facts, *Landsdown* is not applicable. See 460 F. 2d 171, note 8.

/s/ James R. Browning

/s/ Eugene A. Wright

U. S. Circuit Judges

MoCal 8/13/73

Appendix B

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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No. 73-561

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE HARVEY DIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-561

LAWRENCE HARVEY DIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's denial of his motion to dismiss the indictment against him, made after the trial judge had granted his motion for a mistrial, was an appealable order.

Petitioner's jury trial on a charge of having stolen twelve ladies' coats, in violation of 18 U.S.C. 659, began in the United States District Court for the Northern District of California on March 26, 1973. The evidentiary phase of the trial was concluded on the afternoon of the third day (Tr. 383). After the judge instructed the jury on that afternoon and the following morning (Tr. 384-406, 407-421), the jury retired to deliberate at 12:10 p.m. (Tr. 423-424). At 3:40 p.m., in response to a request from the jury, the judge reinstructed the jurors on the element of intent (Tr. 425-427). At 5:30 p.m., the judge called the jurors back and inquired about the progress of their deliberations (Tr. 427). The jurors

reported that they were "rather deadlocked as to certain points in the case" (Tr. 428). The jurors stated that one cause of their disagreement was confusion over the issue of intent; it appeared to them that the judge's second instruction in regard to the element of intent had differed from his initial instructions (Tr. 428-432).

The judge then called counsel into chambers, and petitioner's counsel moved that the jury be dismissed on two grounds—because it was deadlocked and because the difference in the court's two instructions was prejudicial (Tr. 434-436). When the court reconvened after the chambers discussion, the judge declared a mistrial due to the jury's inability to reach a verdict (Tr. 437-438). Petitioner subsequently moved for dismissal of the indictment, contending that another trial would violate his right not to be subject to double jeopardy; this motion was denied. Petitioner's appeal from the denial of the motion was dismissed as nonappealable under 28 U.S.C. 1291 (Pet. App. A).

The court of appeals correctly ruled that the denial of petitioner's motion for dismissal of the indictment could not be appealed. See *DiBella* v. *United States*, 369 U.S. 121. Petitioner incorrectly contends that the decision below conflicts with *United States* v. *Lansdown*, 460 F. 2d 164 (C.A. 4). The court in *Lansdown* explicitly stated that its decision did not apply "to those cases where the mistrial is declared at the request of the defendant since in those cases the defendant has waived any claim of double jeopardy" (460 F. 2d at 171, n. 8).

Petitioner claims (Pet. 8) that his motion for mistrial was forced upon his counsel and was merely ceremonial. There is nothing in the record to support this assertion. To the contrary, it is clear that petitioner's counsel

strongly urged that a mistrial be declared and that neither the trial judge nor the prosecution invited or encouraged such a motion. In these circumstances, petitioner's underlying double jeopardy claim is clearly without merit. See *United States* v. *Tateo*, 377 U.S. 463, 467-468.

It is therefore respectfully submitted the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12